ELECTRICITY CONSUMERS RESOURCE COUNCIL

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The Honorable Tom Bliley
Chairman
Committee on Commerce
US House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We at ELCON very much appreciate your letter of November 30 asking for a "thorough and rigorous analysis" of HR 2944 as approved by the Energy and Power Subcommittee. As you know, ELCON is the national association representing large industrial consumers of electricity. ELCON members come from virtually every segment of the manufacturing community and have long been active in seeking to establish truly open and competitive electricity markets at the wholesale and retail levels.

We understand that, despite your best efforts, the present legislative effort is confined only to wholesale markets. While we still support federal legislation to provide customer choice at the retail level, our comments address only the potential impact of the bill in providing increased competition in wholesale markets.

ELCON believes that HR 2944 as approved by the Energy and Power Subcommittee would hinder, not enhance, wholesale competition. Consumers of electricity would see virtually no benefits from HR 2944 were this bill enacted. In fact, the wholesale electricity market could be rendered less competitive were this bill enacted. Accordingly we cannot support this legislation in its present form.

The bill has a number of significant flaws, the most important of which I have listed below.

State Authority

- Section 3 of the bill establishes that any State law or regulatory order promulgated up to three years after the date of enactment shall be preeminent over federal law, despite the fact that the bill's own Findings (Sec. 2(a)(11)) state that "Congress has the authority to enact laws, under the Commerce Clause of the United States Constitution, regarding the generation, transmission, distribution, and sale of electric energy in interstate commerce."

- To allow each State to act individually, often in pursuit of parochial and self-interested objectives, could create 50 different sets of rules and regulations and 50 different markets, benefitting only today's incumbent suppliers and discouraging new market entrants. The planning of new generation and transmission would likely be delayed, since new rules and regulations that will be written over the next three years could preempt federal action. It would deter, not enhance, interstate commerce in electricity and make a mockery of the Constitution. It is ironic that HR 2944 puts so much trust in state commissions since it was the delegation by PURPA to state commissions that created alleged market inequities and utility complaints regarding the mandatory purchase obligation.

Transmission

- Title I on transmission is by far the most important part of the bill, because unless all power transactions are subject to the same transmission rules, a competitive wholesale market will not exist. Industrial consumers believe that Title I does not provide such open access but rather strips FERC of existing authority under the Federal Power Act to do so.

- Section 101(b) takes away FERC's jurisdiction over "transmission of any bundled retail sale of electric energy." The consequence of this provision is to severely limit the establishment of a competitive interstate electricity market. It makes it difficult if not impossible for any kind of competitive market to emerge since each State would have separate rules and regulations for transmission access. In essence this provision only impedes competition and is clearly anti-competitive.

- Section 101(d) clarifies the right of the States or local authorities to "require as a charge for delivery of electric energy to, or a condition for the purchase or receipt of electric energy...the payment of any charge deemed necessary..." While this provision purports to address the fear of States that industrials and other large consumers will bypass local distribution companies and therefore evade transition charges, that fear is unfounded since direct interconnection with the transmission grid for receipt of electricity is allowed only for "sales for resale" under the Energy Policy Act of 1992. In reality this provision would reduce *existing* options for all users and deter large or small users from seeking new technologies involving on-site generation, including cogeneration and distributed generation.

- Section 103 on Regional Transmission Organizations (RTOs) is insufficient in that RTO membership is merely encouraged and not mandated. Without either (1) requiring utilities to join RTOs (as required in an earlier draft of HR 2944) or (2) authorizing FERC to establish conditions for such membership, utilities will be allowed to operate their transmission systems for their own benefit apart from any RTO, thus compromising the

non-discriminatory, open access requirements that are essential to true competition at the wholesale level. Similarly, the bill allows FERC to approve "an application by *one* or more transmitting utilities to establish or join" an RTO, thus sanctioning a one-utility RTO that would clearly frustrate efforts to foster more competition. In fact allowing only one utility to form an RTO does nothing but preserve the status quo and might give new and strange definition to the word "Regional."

ELCON believes that RTOs should be as large possible (at present we see the need for only three RTOs, but we are open to discussion) in order create a seamless market that induces more competition. The language in HR 2944 would clearly lead to the creation of many mini-RTOs, a situation which would retard competition due to differing access procedures and rate pancaking. Too many RTOs would also harm reliability.

- Section 105 contains two provisions that ELCON believes are anti-competitive. First, the establishment of "Joint Boards" to consider new transmission, while perhaps well intentioned, simply adds one more level of bureaucracy that may actually inhibit or delay the building of new transmission. Second, the "innovative" incentive pricing in Section 105 is unnecessary and could be harmful. This section would allow rates for transmission services to increase without any guaranteed benefits to transmission customers or ultimate consumers. As long as transmission remains a monopoly, it is not be necessary to provide incentives on top of the already adequate rate of return provided under state regulation. Moreover, we believe that if, at some point, transmission is open to competition, that alone will spur new technologies and encourage new capacity.

Reliability

- While the main objective of Title II — to create a statutorily sanctioned electric reliability organization — is good, we question the need for some of the other provisions. In particular, without specific congressional direction, the role of the proposed Affiliated Regional Reliability Entities (ARREs) would be duplicative of the Regional Transmission Organizations created in Title I (not to mention the plethora of other overlapping regional entities already in existence including NERC, Regional Reliability Councils, Regional Transmission Groups, ISOs, and multi-company control areas). We believe that RTOs should be ARREs and assume many of the responsibilities of these other organizations. The intent of legislation should be to ***minimize*** regulatory bureaucracies. Reliability is not enhanced by increasing the number of entities with authority over this important function.

- The language authorizing the New York State Reliability Council to be considered as such a regional entity is parochialism at its worst and would greatly harm the electricity reliability (and the economy) of the multi-state New York Metropolitan area.

- The savings clause in Title II grants state commissions authority over transmission, despite the fact that transmission is clearly interstate in nature. This makes the term "savings clause" a misnomer since this language drastically alters the separation of power between the federal government and states with respect to the bulk power grid as it exists today. Under HR 2944, each individual State could adopt its own regulations on bulk power reliability which may conflict with the regulations of another State, FERC, or NERC. Relegating to States authority over interstate transmission would lead to the balkanization of the power grid, contrary to the general recognition that greater regionalization of transmission is more efficient for maintain reliability.

Mergers

- ELCON believes that the Federal Trade Commission and the Department of Justice should take the primary lead analyzing antitrust issues dealing with horizontal market power (*e.g.*, mergers). FERC's role should be limited to the programmatic review of proposed mergers and acquisitions to ensure that any such merger or acquisition is consistent with FERC's authorities under the Federal Power

Public Utility Holding Company Act (PUHCA)

- The Title V language repealing PUHCA has some shortcomings that will have an anti-competitive impact. Prime among these is the lack of an explicit prohibition on cross-subsidization between regulated and unregulated affiliates. We believe that both FERC and state commissions should have the authority to order divestiture if necessary to prevent cross-subsidization and achieve competitive markets. For electricity consumers, it is critical that the preservation of the public interest functions presently under the authority of the SEC be transferred to another regulatory body.

- An effective date contingent on retail competition, rather than one year after enactment as proposed in HR 2944, would be beneficial from both policy and political perspectives. It would restrict large interstate utilities operating in states without competition (i.e., states where utilities are still vertically integrated with a guaranteed rate of return) from expanding even further, and it would encourage those same utilities to support retail competition in their states and service areas.

Public Utility Regulatory Policies Act (PURPA)

- The Title V language repealing the mandatory purchase provisions of PURPA is simply unfair and anti-competitive. In a truly competitive retail market, where buyers have access to multiple sellers of electricity, those mandatory purchase provisions are no longer necessary. But until that state is reached, we *electricity consumers,* believe that PURPA has had a positive impact on competition in the wholesale electricity industry. Accordingly, we believe that the repeal of the mandatory purchase provisions imposed by PURPA on utilities should not be effective on the date of enactment as proposed in HR

2944 but rather when retail competition actually exists. Similarly, the requirement that utilities provide back-up and maintenance power, as contained in PURPA and repealed in HR 2944, should be effective only after the establishment of a truly competitive retail market where such services can actually be purchased. The elimination of PURPA provisions before the establishment of a competitive market allows existing utilities to exploit their monopoly status to the detriment of captive customers.

- The retention of back-up and maintenance power, and interconnection rights, — all of which were guaranteed to qualifying facilities under PURPA — should not be contingent on existing contracts as called for in HR 2944. There are thousands of qualifying facilities, constructed and financed with the statutory guarantee of back-up power and interconnection, that do not now have and did not ever expect to have sales contracts with utilities. To extend the back-up power and interconnection rights only to qualifying facilities with contracts does a disservice to many others.

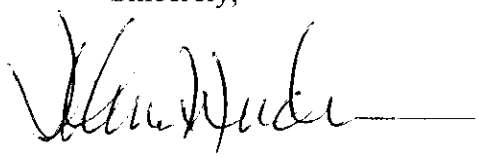
Aggregation

- The language in Section 531 does not go far enough in promoting aggregation and instead would create inequities for industrial, commercial and residential users. ELCON supports allowing users in all States to voluntarily participate in aggregated purchases. For large users, this would allow greater efficiencies in purchasing and increase the ability to compete in world markets. For residential users, purchasing as part of an affinity group (for example, through a church, alumni association, neighborhood group, or in conjunction with an employer) may be their best means to save significant money (this is consistent with the bill's Findings, see Sec. 2(a)(8)(A) and (B)).

In conclusion, ELCON, representing industrial consumers of electricity, believes that the bill approved by the Energy and Power Subcommittee would not promote wholesale electricity competition in the United States. The bill's over-reliance on state authority, particularly regarding transmission access and grid reliability, would not encourage new market participants, technological innovation, or market efficiencies. Industrial consumers, attempting to procure electricity on a competitive basis, will find their efforts restricted to small balkanized markets that preserve the shares of incumbent suppliers. Industrials have already found that "firm" contracts to transmit electricity can be revised and overturned by local utilities at the direction of, or with the sanction of, a state commission. This inability to confirm the delivery of competitively priced electricity is occurring at the same time that electricity prices in other industrial nations are falling, in some instances to rates approximately 50 percent of those found in the U.S.

Delegating 50 state regulatory commissions the exclusive authority over interstate commerce will not create a competitive electricity market. We cite the negative with the delegation of PURPA authority to state commissions as an example. In order for competition to work we need as large a market as possible with efficient interstate highways of "electrical" commerce. We urge you as Chairman of the Commerce Committee to support fundamental changes in the legislation so that HR 2944 fulfills its own title — "to promote competition in electricity markets and to provide consumers with a reliable source of electricity."

Sincerely,



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